

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD STEWARD,

Defendant-Appellant.

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UNPUBLISHED

April 5, 2005

No. 252376

Wayne Circuit Court

LC No. 03-007909-01

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a concealed weapon, MCL 750.227. He was sentenced to ten months to ten years in prison for the assault with intent to do great bodily harm less than murder conviction, two years in prison for the felony-firearm conviction, and two years' probation for the carrying a concealed weapon conviction. He appeals as of right. We reverse and remand in regard to defendant's assault with intent to do great bodily harm less than murder and felony-firearm convictions.

Defendant's first issue on appeal is that his constitutional rights were violated when the trial judge refused to honor the jury's request to be re-instructed on the differences between assault with intent to do great bodily harm less than murder and felonious assault. We agree.

This issue was not properly preserved. When reviewing an unpreserved instructional error, this Court reviews for a plain error which affected substantial rights. A reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96 (2002).

A trial court must instruct the jury on the applicable law and present the case to the jury in a clear and understandable manner. Jury instructions are reviewed as a whole to determine if the trial court made an error requiring reversal. Even if imperfect, jury instructions do not constitute error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). There is no requirement that when a jury has asked for supplemental instruction on specific areas that the trial judge is obligated to give all the instructions previously given. The trial judge need only give those instructions specifically requested. *Id.* at 311.

Here, the jury was properly instructed regarding the three alternative charges of assault with intent to murder, assault with intent to do great bodily harm less than murder and felonious assault and the requisite intent of each alternative charge. However, the differences between assault with intent to do great bodily harm less than murder and felonious assault were not clear to the jury, so it requested a re-reading of those specific instructions. The jury had the instructions that it wanted on tape, but said that the tape was “muffled.” Ultimately, the jury did not get to re-hear the instructions. Under, *Katt, supra* at 311, the trial judge is required to re-read any specific instructions that are requested by the jury to insure that the instructions present the case to the jury in a clear and understandable manner. Because the judge failed to honor the jury’s request to be re-instructed on the differences between assault with intent to do great bodily harm less than murder and felonious assault, we conclude that the trial judge erred.

Courts have held that a defendant’s substantial rights are not affected when a trial judge refuses to re-instruct on issues not specifically requested by the jury. For example, the defendant’s substantial rights were not violated when a trial judge failed to re-instruct the jury on self-defense when it made a request to be re-instructed on manslaughter. *State v Young*, 29 Conn App 754, 761-762; 618 A2d 65 (1992). Nor were a defendant’s substantial rights violated when a trial judge refused to re-instruct the jury on the presumption of innocence when it made a request to be re-instructed regarding reasonable doubt. *State v Huntley*, 681 A2d 10, 14 (Me, 1987). Furthermore, courts have even held that a defendant’s substantial rights are not violated when a trial judge refuses to re-instruct a jury on a specifically requested instruction if it is found that there is overwhelming evidence that the refusal had no effect on the outcome of the case. *Murray v State*, 180 Ga App 493, 494-495; 349 SE2d 490 (1986). However, here the trial judge failed to re-instruct the jury on a specific instruction that it requested. Because a clear understanding of the requested information was essential to what charge the jury would convict defendant of, we conclude that the error was outcome determinative regarding what charge defendant would be convicted of, and thus, defendant’s substantial rights were affected when the trial judge failed to honor the jury’s request to be re-instructed on the differences between assault with intent to do great bodily harm and felonious assault.

Furthermore, reversal is required because the trial judge’s error seriously affected the fairness of the proceedings because the error denied defendant his constitutional right to a properly instructed jury. Thus, this case is remanded in regard to defendant’s assault with intent to do great bodily harm less than murder conviction.

Furthermore, defendant should be re-tried on his felony-firearm conviction. If any conviction for an underlying substantive crime is vacated, the corresponding felony-firearm conviction must also be vacated. *People v Harding*, 443 Mich 693, 716; 506 NW2d 482 (1993). Though we disagree with defendant’s second and third issues on appeal, it is unnecessary to go into detail on either issue given our resolution of defendant’s first issue.

Defendant’s convictions for assault with intent to do great bodily harm less than murder and felony-firearm are reversed, and the matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens  
/s/ David H. Sawyer  
/s/ Helene N. White